Jurisdictional Statement

81-255

No.

AUG 7 1981
ALEXANDER L. STEVAS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND XAVIER M. VELA, ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANTS

v.

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

KERRY L. ADAMS
Attorney

Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether, under the "constitutional doctrine of intergovernmental immunity" recognized in *National League of Cities* v. *Usery*, 426 U.S. 833, 837 (1976), the Fair Labor Standards Act may constitutionally be applied to a private employer that is under contract with a state to perform a traditional and integral governmental function previously carried out by the state itself.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional provisions and statutes involved	2
Statement	2
The question is substantial	13
Conclusion	30
Appendix A	1a
Appendix B	15a
Appendix C	27a
Appendix D	28a
Appendix E	30a

TABLE OF AUTHORITIES

Cases:

Alabama v. *King & Boozer*, 314 U.S. 1	28-29
Board of Regents of the University of Texas System v. *New Left Education Project*, 404 U.S. 541	17
City of Philadelphia v. *SEC*, 434 F. Supp. 281, appeal dismissed, 434 U.S. 1003	23
Coyle v. *Oklahoma*, 221 U.S. 559	18, 22
Curry v. *United States*, 314 U.S. 14	28
Donovan v. *Alternatives Unilimited, Inc.*, C.A. No. 78-3176-Ma (D. Mass., filed Dec. 7, 1978)	14
Donovan v. *Gardner-Athol Mental Health Associates, Inc.*, C.A. 77-1772-F (D. Mass., filed June 17, 1977)	14
Donovan v. *North Central Friends of the Retarded*, C.A. No. 80-737-T (D. Mass., filed Apr. 16, 1980)	13-14
Donovan v. *Volunteers of America*, C.A. No. 80-0296 (M.D. La., filed June 12, 1980)	14

Cases—Continued Page

Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59 21
Fry v. *United States*, 421 U.S. 542 ..... 18, 21
Fullilove v. *Klutznick*, 448 U.S. 448 21
Gonzalez v. *Employees Credit Union*, 419 U.S. 90.. 17
Hodel v. *Indiana*, No. 80-231 (June 15, 1981) 20
Hodel v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981) 17, 20, 21, 22, 23
Hyland v. *Fukuda*, 580 F.2d 977 21
Kern-Limerick, Inc. v. *Scurlock*, 347 U.S. 110..... 28
Lane County v. *Oregon*, 74 U.S. (7 Wall.) 71..... 18
Livolsi v. *City of New Castle, Pennsylvania*, 501 F. Supp. 1146 25
Marshall v. *Elden*, 82 Lab. Cas. (CCH) ¶ 33,595.... 22
Massachusetts v. *Mellon*, 262 U.S. 447 23
Massachusetts v. *United States*, 435 U.S. 444..... 26-27
Mathews v. *Diaz*, 426 U.S. 67 15
Mitchell v. *Donovan*, 398 U.S. 427 17
Mitchell v. *Singstad*, 177 F. Supp. 376 29
McLucas v. *DeChamplain*, 421 U.S. 21 .....14, 15, 16
National League of Cities v. *Usery*, 426 U.S. 833....*passim*
Norton v. *Mathews*, 427 U.S. 524 ..... 15, 16
Oklahoma v. *Atkinson Co.*, 313 U.S. 508 23
Parker v. *Levy*, 417 U.S. 733 14
Powell v. *United States Cartridge Co.*, 339 U.S. 497 ..... 29, 30
Public Building Authority of Birmingham v. *Goldberg*, 298 F.2d 367 29
Public Services Co. v. *FERC*, 587 F.2d 716, cert. denied, 444 U.S. 879 21
Reeves, Inc. v. *Stake*, 447 U.S. 429 25
Skills Development Services v. *Donovan*, C.A. No. 81-3252 (M.D. Tenn., filed Apr. 28, 1981) 13
United States v. *American Friends Service Committee*, 419 U.S. 7 15
United States v. *Boyd*, 378 U.S. 39 ..... 28, 29
United States v. *Christian Echoes Ministry*, 404 U.S 561 17
United States v. *County of Fresno*, 429 U.S. 452.... 25, 28
United States v. *Darusmont*, No. 80-243 (Jan. 12, 1981) 15

Cases—Continued — Page

United States v. *Gillock*, 445 U.S. 360 19
United States v. *Helsley*, 615 F.2d 784 21
United States v. *Pennsylvania Environmental Hearing Board*, 584 F.2d 1273 29
United States v. *Tonry*, 605 F.2d 144 21
Walling v. *Craig*, 53 F. Supp. 479 29
Walling v. *McCrady Const. Co.*, 60 F. Supp. 243, aff'd, 156 F.2d 932, cert. denied, 329 U.S. 785 29
Walling v. *New Orleans Private Patrol Service*, 57 F. Supp. 143 29
Weinberger v. *Salfi*, 422 U.S. 749 15
Williams v. *Zbaraz*, 448 U.S. 358 ..... 14, 15-16

Constitution, statutes and regulation:

United States Constitution:
Article I, Section 8 ..... 30a
Article VI 30a
Tenth Amendment 30a
Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.* 2, 30a
29 U.S.C. (1964 ed.) 203(d) 29
29 U.S.C. 203(d) 31a
29 U.S.C. 203(r) 8, 31a
29 U.S.C. (Supp. III) 203(s) 8, 32a
29 U.S.C. 203(x) 32a
29 U.S.C. 204(b) 9
29 U.S.C. (Supp. III) 206a 33a
29 U.S.C. 207(a)(1) 33a
29 U.S.C. 217 7
28 U.S.C. 516 9
28 U.S.C. 518 9
28 U.S.C. 519 9
28 U.S.C. 1252 ..... 14, 15, 17
28 U.S.C. 1291 14
28 U.S.C. 1331 7
28 U.S.C. 1337 7
Mont. Rev. Codes Ann. § 71-2001 *et seq.* and § 71-2401 *et seq.* (1975 Cum. Supp.), recodified at Mont. Code Ann. tit. 53, ch. 20, pts. 2 and 3 (1979) 3
28 C.F.R. 0.20 9

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND XAVIER M. VELA, ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANTS

v.

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-14a) is reported at 641 F.2d 1361. The opinion of the district court (App. B, *infra*, 15a-26a) is unofficially reported at 24 Wage and Hour Cas. (BNA) 99.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1981. A notice of appeal to this Court was filed on May 19, 1981 (App. D, *infra*, 28a-29a).

On July 8, 1981, Justice Rehnquist extended the time for docketing the appeal to and including August 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1252, and is further discussed at pages 14-17, *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution and the Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, are set forth in Appendix E, *infra*, 30a-33a.

STATEMENT

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the Court held that the "constitutional doctrine of intergovernmental immunity" (*id.* at 837) bars application of the minimum-wage and overtime provisions of the Fair Labor Standards Act to "the States *qua* States" (*id.* at 847) insofar as the Act "operate[s] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852).[1] The question presented in the instant case is whether the Act may constitutionally be applied to a private employer that is under contract with a state to provide residential care for mentally retarded adults that the state itself previously furnished.

1. The relevant facts in this case are undisputed (App. A, *infra*, 4a). Appellee Richland County Association for Retarded Citizens is a private nonprofit corporation that owns and operates a residential care facility for mentally retarded adults

[1] The history of the Fair Labor Standards Act and its application to governmental entities is traced in *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 835-839.

in Sidney, Montana. The Association elects a Board of Directors that is responsible for overseeing the daily operations of the Home and for hiring and paying the staff (App. A, *infra*, 2a; App. B, *infra*, 16a, 17a).

In 1973 and 1975, the Montana Legislature passed statutes designed to "deinstitutionalize" the care and treatment of developmentally disabled adults by placing them in small, family-oriented residential facilities in local communities rather than in large, centralized institutions (App. A, *infra*, 2a; App. B, *infra*, 16a). See Mont. Rev. Codes Ann. § 71-2001 *et seq.* and § 71-2401 *et seq.* (1975 Cum. Supp.), recodified at Mont. Code Ann. tit. 53, ch. 20, pts. 2 and 3 (1979). The statutes authorized the Montana Department of Social and Rehabilitation Services either directly to operate such community-based group homes or to contract with local nonprofit corporations to establish and operate the homes (Tr. 65).[2] However, because the State appropriated funds only for the operation of homes through contracts, all of the homes in existence at the time of trial were run by private corporations pursuant to contracts with the State (Tr. 65-66).

Appellee Richland County Association was formed in 1975 with the encouragement and assistance of the Developmental Disabilities Division of the Montana Department of Social and Rehabilitation Services (App. A, *infra*, 2a; App. B, *infra*, 18a). The Division recruited people in the community to establish a local facility for retarded citizens (App. B, *infra*, 18a), and in March 1976 appellee entered into a "Purchase of Services Contract" with the Division to provide local residental care and training for eight mentally retarded adults at appellee's Sidney Group

[2] "Tr." refers to the transcript of the trial.

Home (App. A, *infra*, 2a-3a; App. B, *infra*, 18a). The contract specified that appellee "shall maintain in all respects [its] present control and autonomy over eligible clients with respect to: the application of [its] intake procedures and requirements, and the methods, times, means and personnel for furnishing * * * [the] services [purchased by the State]" (Def't Exh. F, at 2; see also App. A, *infra*, 2a).[3] The contractual budget for the Home stated that the staff of two houseparents was to be paid designated salaries rather than hourly wages (Def't Exh. F, Att. B; App. A, *infra*, 3a; App. B, *infra*, 19a), but it allowed appellee to increase those salaries within prescribed limits by reallocating available funds from other budget categories (Def't Exh. F, at 4; Tr. 13). The Division offered advice to appellee's Board of Directors and to the staff at the Home, and ensured that the contract was being performed (App. A, *infra*, 3a; App. B, *infra*, 19a). The Home was required to make monthly reports to the Division on the progress of each resident (App. B, *infra*, 18a).

Funds for the Home came from several sources, including federal and state grants and private contributions (App. A, *infra*, 2a-3a).[4] The State pro-

---

[3] The contract also specified that "the eligibility of individuals to receive the purchased services shall be determined by the Department [of Social and Rehabilitation Services]" and that appellee would "provide services to eligible clients under this contract only after referral by the Department's case manager" (Def't Exh. F, at 2; App. A, *infra*, 3a; App. B, *infra*, 19a).

[4] The contract between appellee and the State was expressly designed "[t]o safeguard future Federal matching [funds]" and stipulated that "[i]f Federal matching money is not available, then the contract is void. If Federal money is available,

vided $9000 for making a down-payment on the residence and furnishing the facility. In addition, each of the eight residents in the Home received monthly a federal Supplemental Security Income payment of $167.80 and a state supplementary payment of $104; of that amount, $26.60 was allotted to the individual resident for personal needs, and the remainder was deposited in the Home's account to be used for operation, maintenance, food, and supplies. The State also provided $150 per month for the training of each resident, of which $15 went directly to the individual for personal needs. Finally, appellee received private donations to support the Home (App. A, *infra*, 2a-3a; App. B, *infra*, 18a-19a, 20a; Tr. 36).

The houseparents were solely responsible for the care and supervision of the residents at the Home, who required essentially constant attention (App. B, *infra*, 18a). Thus, except for the six hours each weekday that the residents attended a sheltered workshop outside the Home and for any periods that the residents spent with their respective families (*ibid.*), the houseparents had to devote their full time to the residents "as needed 24 hours a day" (App. A, *infra*, 3a). Moreover, during the residents' workshop sessions, the houseparents were engaged in preparing their evaluations of the residents and maintaining the books and records of the Home (App. B, *infra*, 18a). As the district court summarized (*id.* at 25a), "[t]he duties and responsibilities of a group

---

but discontinued at any time during the term of the contract, the Department is in no way obligated to either allocate state funds to meet the terms of this contract, or to carry out the provisions of the contract after the date of the discontinuance of Federal matching [funds]" (Def't Exh. F, at 5).

home parent require that a parent be available twenty-four hours per day and that a parent be actively working from approximately 7 a.m. until 10 p.m. during each weekday and from 8 a.m. until 11 p.m. on weekends."

It is uncontested that the houseparents were employed by appellee rather than by the State (App. A, *infra*, 2a, 6a; Tr. 4, 10, 60). Although the houseparents had some contacts with the State agency, they were answerable only to appellee's Board of Directors (Record on Appeal 3; B. Harmeling Deposition, at 19). See also Record on Appeal 96 (Appellee's Brief in the District Court in Support of Proposed Findings and Conclusions, at 4) ("the group home parents here in question are not 'state employees' ").

2. In November 1976, the houseparents inquired of the Department of Labor whether they were covered by the Fair Labor Standards Act.[5] Following an investigation, the Department determined that the Act was applicable and that the houseparents were owed a total of approximately $10,500 in back pay under the minimum-wage and overtime provisions of the Act (App. B, *infra*, 20a).[6] In response to this determination, appellee's Board of Directors considered hiring more houseparents and instituting a schedule of working in shifts in order to comply

---

[5] The two houseparents were initially paid a combined monthly salary of $650, which was later increased to $800 and subsequently to $900 per month (App. B, *infra*, 19a).

[6] It was uncontroverted in the district court that this figure represents a reasonably accurate computation of back wages, and the parties stipulated that it could be used by the court in determining the amounts due and owing in the event that the Act was held to apply (Record on Appeal 86).

with the Act; however, the Board rejected the proposal on the ground that it would impede the consistency of the training provided to residents and undermine the family-oriented environment of the Home (*id.* at 21a). In addition, the houseparents' attempt to comply with an eight-hour work schedule was found to be unsatisfactory because their duties and obligations could not be performed in an eight-hour day (*ibid.*).

Appellee[7] thereafter brought this action against appellants[8] in the United States District Court for the District of Montana. Appellee sought a declaratory judgment that the Act did not apply to employees of the Sidney Group Home as a matter of statutory construction and that, if construed to be applicable, was unconstitutional.[9] Appellants filed a counterclaim to enjoin appellee from violating the minimum-wage, overtime, and recordkeeping provisions of the Act and from withholding the unpaid compensation due under the Act (App. B, *infra*, 21a, 26a).[10]

---

[7] The Montana Department of Social and Rehabilitation Services was also a party plaintiff, but the district court granted appellants' motion to dismiss DSRS from the case for lack of a legal interest in the controversy between the Richland County Association and the Department of Labor (Record on Appeal 13-14, 20-21, 78).

[8] The houseparents were also named as defendants but were later dismissed upon stipulation (Record on Appeal 76).

[9] The jurisdiction of the district court was founded on 28 U.S.C. 1331 and 1337 (App. B, *infra*, 21a; Record on Appeal 1).

[10] The jurisdiction of the district court over the counterclaim rested on 29 U.S.C. 217 (App. B, *infra*, 21a; Record on Appeal 29).

Following a one-day bench trial, the district court granted judgment in appellee's favor and dismissed appellants' counterclaim. The court concluded (App. B, *infra*, 22a-23a) that the Sidney Group Home falls within the Act as an "enterprise engaged in commerce" under 29 U.S.C. (& Supp. III) 203(r) and (s) (App. E, *infra*, 31a-32a). However, the court held that the Act as thus construed is unconstitutional. Although recognizing that appellee "is unquestionably an entity distinct from the State of Montana" (App. B, *infra*, 25a), the court found that (*id.* at 25a-26a)

> it is not completely free from state control. The group home derives substantial financial and technical assistance from the State of Montana, in exchange for which it furnishes services which must meet exacting state standards. The Sidney Group Home is in all senses the alter ego of the State, standing in the shoes of its creator, the State Department of Social and Rehabilitation Services, to provide a traditional state service to mentally handicapped adults.

In addition, the court found that the cost to bring the group homes in Montana into compliance with the Act would be "prohibitive" (*id.* at 25a) and that the alternatives available to the State to conform to the Act—to "[t]erminate some group home contracts in order to pay overtime to parents in the remaining homes; or * * * [h]ire parents to work eight-hour shifts with no overtime; or * * * [t]erminate contracts with all of the group homes and have the Department run the homes itself" (*id.* at 24a)—would displace the State's policy to provide an adequate number of residential facilities, managed by local private groups and run in a family-oriented manner by professionals serving as full-time house-

parents, in order to "deinstitutionalize" the care of the developmentally disabled (*id.* at 24a-25a). On that basis, the court held that (*id.* at 26a)

> [t]he Fair Labor Standards Act is unconstitutional as applied to [appellee] Association in its operation of the Sidney Group Home. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Application of the requirements of the Act would inevitably result in displacement of one or more of the State of Montana's considered policy choices in carrying out its traditional function of caring for the mentally handicapped. *Id.* at 851. In addition, the financial burdens required by the minimum wage provisions of the Act would severely affect the State's fiscal decision-making in the area of services to the mentally handicapped. *Id.* at 846.

3. On the Department of Labor's appeal,[11] a divided panel of the Ninth Circuit affirmed the decision of the district court that the Act is unconstitutional as applied. Writing for the majority, Judge Frye, sitting by designation, acknowledged that *National League of Cities* had "distinguished federal regulation of private persons and businesses from similar regulation directed to the States as States" (App. A, *infra*, 5a) and that the Court's decision "applies only to States as States, and * * * only when the exercise of the Commerce power *directly* affects

---

[11] Under 29 U.S.C. 204(b) and implementing agreements with the Department of Justice, the Department of Labor may authorize and conduct its own litigation in the lower federal courts in Fair Labor Standards Act cases without the approval or participation of the Attorney General or the Solicitor General. Compare 28 U.S.C. 516, 518, 519; 28 C.F.R. 0.20.

the state's integrity or ability to function *effectively* in a federal system" (*id.* at 6a; emphasis in original). Nevertheless, the majority concluded that "*National League of Cities* does not require direct state involvement. The key is state involvement and the performance of an integral government function" (*id.* at 8a). Based on its reading of *National League of Cities*, the majority held (*ibid.*) that "[b]ecause the Association essentially stands in the position of the State in providing a traditional government service,[12] and because the minimum wage/maximum hour requirements of the FLSA as applied to [t]he Association constitute a direct federal interference with Montana's exercise of its sovereignty, * * * the group home is exempt under the rule of *National League of Cities* from application of the FLSA." Finally, the majority recognized (*ibid.*) that under its decision the states would have "the sovereign right to * * * contract * * * to the private sector[,] at a rate cheaper than that for equivalent services provided by the private sector exclusively * * * [because the state contracts] would be exempt from the FLSA[,] * * * all services * * * [that] qualify as an 'integral government function' * * *."

Judge Alarcon dissented from the majority's holding that *National League of Cities* "compelled" the conclusion "that the tenth amendment prevents Congress from enacting laws under the Commerce Clause which regulate the private sector in the performance

---

[12] The majority characterized "[t]he key issue * * * [to be] whether the operation of the Home is an 'integral government function' within the scope of *National League of Cities*" (App. A, *infra*, 6a). However, appellants did not contest that the care and treatment of the mentally retarded is an "integral" and "traditional" governmental function.

of activities formerly performed by the [S]tate of Montana" (App. A, *infra*, 9a). Judge Alarcon emphasized the undisputed fact that "[t]he Association involved in this case is not a state or a municipality, is not an *agency* of a state or municipality, but is a private, non-profit corporation" (*id.* at 10a; emphasis in original), and he noted the absence of any authority "to explain th[e] curious metamorphosis, or to support th[e] astonishing proposition[,] * * * that a private non-profit corporation somehow takes on the trappings of a sovereign government when it is engaged in activities which were formerly offered by the state" (*ibid.*). Accordingly, the dissent concluded that appellee corporation, "in every sense of the word, is a private business" (*ibid.*) and therefore subject to "[t]he minimum wage and hour provisions of the Fair Labor Standards Act applicable to the private sector [that] have long been recognized as a valid exercise of Congress' Commerce Clause power, a result reaffirmed in [*National League of Cities*]" (*ibid.*).[13]

In addition, Judge Alarcon rejected the majority's reasoning "that subjecting employees of [appellee] to the minimum wage and hour laws is a 'direct federal interference' with Montana's exercise of its

---

[13] Judge Alarcon also observed that, under *National League of Cities*, "it is *unnecessary* to determine whether the service performed is a traditional governmental function if the employer is in * * * [the] private sector. The tenth amendment applies solely to the states *as States*" (App. A, *infra*, 10a-11a; emphasis in original). Since "the evidence shows conclusively that [appellee] is a private entity and not a unit of state government," Judge Alarcon concluded that the Fair Labor Standards Act would be applicable "[e]ven if it is conceded that [appellee] is engaged in an 'integral government function'" (*id.* at 10a).

sovereignty" (App. A, *infra*, 12a, quoting *id.* at 8a). First, he found that application of the Act would not "completely thwart Montana's decision to provide assistance to the mentally disabled in a normal home environment" (*id.* at 12a) because the State had alternative means to effectuate that policy (*id.* at 12a-13a); the single method foreclosed to the State would be the use of private employees in disregard of the wage and hour requirements established by Congress. Second, Judge Alarcon perceived no interference with state sovereignty simply because the Act "increase[s] the cost of contracting state business out to private business, making such contracting a less attractive and sometimes prohibitively expensive option" (*id.* at 13a). As the dissent explained (*id.* at 13a-14a; emphasis in original):

> The majority assumes that whenever a federal wage law adversely affects a state's decision to structure essential services in a certain way, the federal government is unconstitutionally intruding into that state's sovereignty. This assumption is incorrect. * * * [T]he states have no inherent tenth amendment right to *demand* that contracts with private businesses (must) always be cheaper or more desirable than providing the services themselves. The states must come to the private sector as it is, evaluating whether the private sector, subject as it is to minimum wage laws, worker's compensation requirements, and child labor laws, can still provide equivalent services at a lower cost. To hold otherwise would mean that the states have a sovereign right to contract their services out to the private sector at a cheaper cost, and that anything * * * [in] federal wage laws which increase[s] those costs necessarily interfere[s]

> with that right. One looks in vain in [*National League of Cities*] for principles justifying such a result.

Finally, Judge Alarcon expressed concern over the breadth of the majority's decision. Noting that "[v]irtually every other 'integral' state function—police, fire, education, health services, refuse collection—could conceivably be contracted out to private businesses," the dissent objected that "[t]he majority's decision is an open invitation to states and municipalities to solve their fiscal problems by contracting out their services to private companies which would then be freed from any legal obligation to pay decent wages or set reasonable working hours. Such a result cannot be required by the tenth amendment" (App. A, *infra*, 13a).

THE QUESTION IS SUBSTANTIAL

This case presents an important question concerning the authority of Congress to ensure reasonable wages and hours for workers in interstate commerce. The courts below have held unconstitutional the Fair Labor Standards Act as applied to employees of a private corporation that is under contract with a state. Because this holding of unconstitutionality represents an unsupported impairment of federal supremacy and threatens to deprive a substantial number of employees of the protections that Congress has established, review by this Court is warranted.[14]

---

[14] We are advised that the issue of the constitutionality of the Fair Labor Standards Act as applied to private parties under contract with a state is currently pending in several other cases. See, *e.g.*, *Skills Development Services* v. *Donovan*, C.A. No. 81-3252 (M.D. Tenn., filed Apr. 28, 1981); *Donovan v. North Central Friends of the Retarded*, C.A. No. 80-737-T

1. A threshold issue is presented concerning this Court's jurisdiction. The district court, relying on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), invalidated the Fair Labor Standards Act as applied in this case. Accordingly, a direct appeal to this Court would have been available pursuant to 28 U.S.C. 1252. The Ninth Circuit was therefore without jurisdiction over the Department of Labor's appeal from the judgment of the district court. See 28 U.S.C. 1291 ("[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court").[15]

Nevertheless, we believe that this Court has jurisdiction to entertain the instant appeal under 28 U.S.C. 1252. First, "the literal requirements of § 1252 are satisfied in the present case[], for the[] appeal[] w[as] taken from the final judgment of a federal court declaring unconstitutional an Act of Congress * * * in a civil action to which [an officer of] the United States was a party * * *." *Williams* v. *Zbaraz*, 448 U.S. 358, 366-367 (1980). See also, *e.g.*, *McLucas* v. *DeChamplain*, 421 U.S. 21, 30 (1975). Since the term " 'any court of the United States,' as used in § 1252, includes the courts of appeals" (*Parker* v. *Levy*, 417 U.S. 733, 743 n.10 (1974)), and since "a direct appeal may be taken

---

(D. Mass., filed Apr. 16, 1980); *Donovan* v. *Volunteers of America*, C.A. No. 80-0296 (M.D. La., filed June 12, 1980); *Donovan* v. *Alternatives Unlimited, Inc.*, C.A. No. 78-3176-Ma (D. Mass., filed Dec. 7, 1978); *Donovan* v. *Gardner-Athol Mental Health Associates, Inc.*, C.A. 77-1772-F (D. Mass., filed June 17, 1977).

[15] No question of the court of appeals' jurisdiction was raised by the parties or by the Ninth Circuit itself.

when, as here, a federal statute has been held unconstitutional as applied to a particular circumstance" (*United States* v. *Darusmont*, No. 80-243 (Jan. 12, 1981) (per curiam), slip op. 1), the statutory prerequisites under Section 1252 are met here by the direct appeal to this Court from the judgment of the court of appeals that the Fair Labor Standards Act is unconstitutional as applied.

Moreover, any defect in the jurisdiction of the court of appeals does not deprive this Court of its statutory jurisdiction pursuant to Section 1252. In accordance with the "unambiguous[]" language and "plain" purpose of the statute to provide "review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality," it is well settled that "this Court's jurisdiction under § 1252 in no way depends on whether the * * * [lower] court had jurisdiction." *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 31. See also *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 367-368; *Mathews* v. *Diaz*, 426 U.S. 67, 74 n.6 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n.8 (1975); compare *Norton* v. *Mathews*, 427 U.S. 524, 529 & n.3 (1976).[16] As the Court explained in *Williams* v. *Zbaraz*, *supra*, 448 U.S. at 367-368:

> The question thus arises whether the [d]istrict [c]ourt's lack of jurisdiction in declaring the Hyde Amendment unconstitutional divests this Court of jurisdiction over these appeals. We

[16] In addition to the *McLucas* line of cases, see also *United States* v. *American Friends Service Committee*, 419 U.S. 7, 9 n.4, 12 n.7 (1974) (per curiam) (pursuant to 28 U.S.C. 1252, this Court had jurisdiction to decide issues under the Anti-Injunction Act without regard to the jurisdiction of the district court).

> think not. * * * [I]n the *McLucas* case * * * this Court pretermitted the question whether the single-judge [d]istrict [c]ourt had had jurisdiction to enter the challenged preliminary injunction, and instead resolved the appeal on the merits. It follows from *McLucas* that, notwithstanding the fact that the [d]istrict [c]ourt was without jurisdiction to declare the Hyde Amendment unconstitutional, this Court has jurisdiction over these appeals * * *.

Thus, whether the court of appeals "did or did not have jursdiction to act, this case is properly here under § 1252." *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 32. The court of appeals' error in entertaining the appeal should not prevent review of the court of appeals' substantive error in deciding the case as it did.

If the Court agrees with our submission that it has jurisdiction over this appeal, we believe that the appropriate disposition would be to decide the appeal on the merits rather than "to vacate the judgment and remand for * * * [proper proceedings in the lower courts]." *Norton* v. *Mathews*, *supra*, 427 U.S. at 532 n.9; see also *McLucas* v. *DeChamplain*, *supra*, 421 U.S. at 32 & n.12. Here, the district court, which unquestionably had jurisdiction, has already rendered its decision in this case, and review by the court of appeals was merely an unnecessary step. "Thus, there is no point in remanding" the case to the lower courts for further proceedings (*Norton* v. *Mathews*, *supra*, 427 U.S. at 531), and "no reason [for the Court] not to resolve the * * * [constitutional issue] on the merits" (*Williams* v. *Zbaraz*, *supra*, 448 U.S. at 368 n.10). In the unusual circumstances presented here, exercise by the Court of its jurisdiction to decide the merits at this stage would best promote sound judicial administration and effectuate

the congressional policy supporting Supreme Court review of judgments striking down federal statutes.[17]

2. Contrary to the decision below, the "constitutional doctrine of intergovernmental immunity" (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 837) does not bar application of the Fair Labor Standards Act to employees of a private corporation that, like appellee, has entered into a contract with a state. In extending the decision in *National League of Cities* v. *Usery* to the instant situation, the court of appeals ignored fundamental differences between the cases and departed from the analysis followed by the Court in *National League of Cities* and recently reaffirmed in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981).

In *National League of Cities*, the Court held that the 1974 amendments to the Fair Labor Standards Act, which "extended the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions" (426 U.S. at 836), were unconstitutional because they "directly supplant[ed] the considered policy choices of the States' elected officials and administrators as to how they wish to structure pay scales in state employment" (*id.* at 848). The

---

[17] In the alternative, the Court should vacate the judgment of the court of appeals and remand the case to the district court for entry of a fresh judgment from which a direct appeal may be taken pursuant to 28 U.S.C. 1252. The Court has followed this approach in analogous situations. See, *e.g.*, *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 101 (1974); *United States* v. *Christian Echoes Ministry*, 404 U.S. 561, 566 (1972); *Board of Regents of the University of Texas System* v. *New Left Education Project*, 404 U.S. 541, 545 (1972); *Mitchell* v. *Donovan*, 398 U.S. 427, 431-432 (1970).

Court observed that the amendments sought "to regulate directly the activities of States as public employers" (*id.* at 841) and spoke "directly to the States *qua* States" (*id.* at 847). Finding that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime" (*id.* at 845), the Court concluded that "the challenged amendments operate[d] to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions * * *" (*id.* at 852) and therefore "would impair the States' 'ability to function effectively in a federal system'" (*ibid.*, quoting *Fry* v. *United States*, 421 U.S. 542, 547 n.7 (1975)) and intrude upon state "'functions essential to separate and independent existence'" (426 U.S. at 845, quoting *Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911), and *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

As noted by the dissent below (App. A, *infra*, 9a), the Court in *National League of Cities* explained that "the dispositive factor" in invalidating the Fair Labor Standards Act amendments was "that Congress has attempted * * * to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments" (426 U.S. at 852). Thus, "the vice of the Act as sought to be applied here is that it directly penalizes the States for choosing to hire *governmental employees* on terms different from those which Congress has sought to impose" (*id.* at 849; emphasis added). In contrast to that situation, which was held to violate the "constitutional doctrine of intergovernmental immunity"

that "run[s] in favor of the States *as States*" (*id.* at 837; emphasis in original), the Court recognized that (*id.* at 840, 845)

> [c]ongressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, * * * [is well settled].
>
> * * * * *
>
> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States.

Emphasizing that a state, unlike a private employer, "is not merely a factor in the 'shifting economic arrangements' of the private sector of the economy * * * but is itself a coordinate element in the system established by the Framers for governing our Federal Union" (*id.* at 849), the Court stressed "that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce" (*id.* at 854).[18]

---

[18] See also *United States* v. *Gillock*, 445 U.S. 360, 371 (1980):

> [W]e recognized in *National League of Cities* that the regulation by Congress under the Commerce Clause of individuals is quite different from legislation which directly regulates the internal functions of States. * * * Although the lack of an evidentiary privilege for a state legislator might conceivably influence his conduct while in the legislature, it is not in any sense analogous to the direct regulation imposed by the federal wage-fixing legislation in *National League of Cities*.

The *National League of Cities* analysis was reiterated in *Hodel* v. *Virginia Surface Mining & Reclamation Association, supra.*[19] In that case, the district court concluded that although the Surface Mining Control and Reclamation Act of 1977 " 'ultimately affects the coal mine operator,' * * * the Act contravenes the Tenth Amendment because it interferes with the States' 'traditional governmental function' of regulating land use * * * [and] impermissibly constrict[s] the State's ability to make 'essential decisions' " (slip op. 18). In unanimously overturning that conclusion, the Court "began by drawing a sharp distinction between congressional regulation of private persons and businesses 'necessarily subject to the dual sovereignty of the Nation and of the State in which they reside' * * * and federal regulation 'directed not to private citizens, but to the States as States' " (slip op. 19, quoting *National League of Cities* v. *Usery, supra,* 426 U.S. at 845). Explaining that "in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy * * * [the] requirement[] * * * [of] showing that the challenged statute regulates the 'States as States' " (slip op. 21, quoting 426 U.S. at 854), the Court found that the "Surface Mining Act govern[s] only the activities of coal mine operators who are private individuals and businesses" and does not "compel[]" the states to comply with a federal standard or participate in a federal program "in any manner whatsoever" (slip op. 21-22). And the Court rejected the argument that it should

> look[] beyond the activities actually regulated by the Act to its conceivable effects on the States'

---

[19] See also *Hodel* v. *Indiana,* No. 80-231 (June 15, 1981), slip op. 13-14.

> freedom to make decisions in areas of "integral governmental functions."
>
> * * * * *
>
> Contrary to the assumption by both the [d]istrict [c]ourt and appellees, nothing in *National League of Cities* suggests that the Tenth Amendment shields the States from pre-emptive federal regulation of *private* activities affecting interstate commerce.

Slip op. 23, 24 (emphasis in original).[20]

As in *Virginia Surface Mining*, the holding below in this case constitutes "an unwarranted extension of the decision in *National League of Cities*" (slip op. 21). Unlike *National League of Cities*, the present case involves application of the Fair Labor Standards Act, not to a sovereign state, but rather to a private corporation "necessarily subject to * * * dual sovereignty" (426 U.S. at 845). A private party cannot resist enforcement of a federal statute on grounds of state sovereignty, and nothing in the application of the Act to appellee " 'impairs the States' integrity or their ability to function effectively in a federal system' " (*National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843, quoting *Fry* v. *United States*, *supra*, 421 U.S. at 547 n.7) or threatens "the States' 'sepa-

---

[20] See also *Fullilove* v. *Klutznick*, 448 U.S. 448, 476 (1980) (opinion of Burger, C.J.); *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 84 n.27 (1978). Lower courts have likewise sustained federal action that is directed at private entities but has an incidental effect on a state. See, *e.g.*, *United States* v. *Tonry*, 605 F.2d 144, 148-150 (5th Cir. 1979); *Hyland* v. *Fukuda*, 580 F.2d 977, 981 n.5 (9th Cir. 1978); cf. *United States* v. *Helsley*, 615 F.2d 784, 787 (9th Cir. 1979), cited with approval in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 22 n.30; *Public Services Co.* v. *FERC*, 587 F.2d 716, 721 (5th Cir.), cert. denied, 444 U.S. 879 (1979).

rate and independent existence'" (426 U.S. at 851, quoting *Coyle* v. *Oklahoma*, *supra*, 221 U.S. at 580). The lower courts' expansion of *National League of Cities* simply ignores this critical distinction between the cases and is inconsistent with the Court's rationale in *National League of Cities* and *Virginia Surface Mining*.[21]

To be sure, as the courts below noted (App. A, *infra*, 7a, 8a; App. B, *infra*, 21a, 23a-26a), compliance by appellee with the Fair Labor Standards Act might increase the costs of operating its facility and thus make it less attractive to the State of Montana to contract with appellee. This indirect consequence does not, however, render the Act unconstitutional.

First, as the foregoing decisions of this Court make clear, the possibility that a state's policy choice may be affected or even superseded does not, by itself, present a basis to invalidate a federal statute. Rather, it is the direct regulation of the state *qua* state that *National League of Cities* prohibits. "[T]he determinative factor * * * [under *National League of Cities* is] the nature of the federal action, not the ultimate economic impact on the States. * * * [E]ven if it is true that the Act's requirements will have a measurable impact on * * * [the State], this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment." *Hodel* v. *Virginia Surface Mining & Reclamation Association*,

---

[21] See also *Marshall* v. *Elden*, 82 Lab. Cas. (CCH) ¶ 33,595, at 48,040 (N.D. Ill. 1977) ("The test for coverage of the Fair Labor Standards Act is the nature of the defendant's business and the employment of his employees, not that of his clients. Even if the defendant is performing services for a governmental agency which is within the exemption of *National League of Cities*, he is doing so as a private employer").

supra, slip op. 26 n.33, citing *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 534-535 (1941).

Moreover, numerous federal statutes and programs might have a similar incidental effect on state decisionmaking. Indeed, any federal standard that might result in higher expenses for the private sector—such as health and safety regulations, environmental controls, labor laws, or tax requirements—could influence a state's decision whether to involve a private party in the performance of governmental services. But in light of Congress' plenary authority over private entities in such matters of commerce and social welfare, these myriad federal programs are surely beyond challenge notwithstanding any collateral impact they could have on the states.[22] As the dissent below correctly pointed out (App. A, *infra*, 13a), the federalist system cannot be thought to imply "that whenever a federal * * * law adversely affects a state's decision to structure essential services in a certain way, the federal government is unconstitutionally intruding into the states' sovereignty." See also *City of Philadelphia* v. *SEC*, 434 F. Supp. 281, 287-288 (E.D. Pa.) (three-judge court), appeal dismissed for want of jurisdiction, 434 U.S. 1003 (1977).

In addition, notwithstanding application of the Fair Labor Standards Act to appellee, the State of Montana retains broad latitude and discretion in carrying out its program of "deinstitutionalization." Insofar as the State finds that the program would be too costly if appellee paid minimum wages and overtime compensation to its employees, several alterna-

---

[22] Compare *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923) (state cannot interpose itself as *parens patriae* between its citizens and the federal government, which is constitutionally empowered to tax and govern persons directly).

tive means are available for the State to pursue its goal of small, community-based residential facilities under the supervision of professionals serving as full-time houseparents. For example, the State could itself establish and operate the homes; or it could create a public corporation to do so; or it could delegate authority to regional, county, municipal, or other local governments for them to adopt either of the preceding approaches. In view of these and other alternatives, the effect of the Act on the State's policy of "deinstitutionalization" is minimal.

Indeed, the only choice not open to the State is the use of private employees on terms more favorable than generally exist in the private sector. A state's attempt to obtain such economic advantage for itself is plainly not an essential part of the state's sovereignty necessary to maintain its fundamental and independent existence. As Judge Alarcon observed in dissent (App. A, *infra*, 13a-14a):

> The majority's decision is an open invitation to states and municipalities to solve their fiscal problems by contracting out their services to private companies which would then be freed from any legal obligation to pay decent wages or set reasonable working hours. Such a result cannot be required by the tenth amendment.
>
> * * * [T]he states have no inherent tenth amendment right to *demand* that contracts with private businesses (must) always be cheaper or more desirable than providing the services themselves. The states must come to the private sector as it is, evaluating whether the private sector, subject as it is to minimum wage laws, worker's compensation requirements, and child labor laws, can still provide equivalent services at a lower cost.

Cf. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 (1980) ("state proprietary activities may be, and often are, burdened with the same restraints imposed on private market participants"). The court of appeals' decision unjustifiably creates an "advantage * * * [for the State of Montana] in the employment market" and affords the State "the power—enjoyed by no other employer—" of avoiding the incidents of the Fair Labor Standards Act in its contracts with the private sector. *United States* v. *County of Fresno*, 429 U.S. 452, 464 & n.12 (1977). Contrary to the decision below, *National League of Cities* does not suggest that a state is entitled to exact preferential terms in its dealings with private entities or to avail itself of the benefits of a contractual arrangement with a private concern while avoiding the corresponding burdens of the transaction.[23]

---

[23] An analogous situation was presented in *Livolsi* v. *City of New Castle, Pennsylvania*, 501 F. Supp. 1146 (W.D. Pa. 1980). There, the trustees of an employee welfare benefit fund brought suit pursuant to the Employee Retirement Income Security Act of 1974 against a city that participated in a multi-employer welfare fund to which both public and private employers made contributions. The court rejected the city's motion to dismiss this cause of action under *National League of Cities* (501 F. Supp. at 1150):

> In the present case, * * * the element of compulsion that was so important to the Court in [*National League of Cities*] is markedly absent. The statutory scheme established under ERISA does not contemplate federal regulation of state and local governments. Quite the contrary ERISA explicitly exempts welfare plans operated by state and local governments from its regulation. See 29 U.S.C. § 1003(b)(1). However, when a state or local government body chooses a private welfare benefit plan for its employees, it will subject itself to federal jurisdiction under ERISA. Since the local governmental body

For these reasons, we submit that the doctrine of state sovereignty is not infringed merely because a contract between the state and a private party is subject to the economic forces, including the costs of complying with federal statutes, that are operative in the private sector. Nothing in *National League of Cities* requires that a private entity under contract with a state must be exempted from an Act of Congress in order to allow the state more favorable terms than would otherwise be available in the marketplace.[24]

This analysis is further supported by the decisions of the Court in the area of inter-governmental immunity from taxation. The immunity of the states from federal taxes rests on the same principles of state sovereignty that underlie *National League of Cities*. See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. 444, 455 (1978) (plurality opinion); *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 843-844 n.14. As *Massachusetts* v. *United States* recently explained in summarizing the prior decisions of the Court:

> [B]ecause the [federal income] taxes imposed [on state officials] were nondiscriminatory and thus also applicable to income earned by persons in private employment, the risk was virtually nonexistent that such revenue provisions could

---

voluntarily accepted a private welfare benefit plan for its employees it cannot later complain that ERISA regulation of that plan invades its sovereignty.

[24] Indeed, in enterprises doing only part of their work under contract to the state, a *pro tanto* exemption from the Fair Labor Standards Act often would not inure to the economic benefit of the state, because of the employer's reluctance or inability to impose disparate terms of employment for similar work performed for different customers.

> significantly impede a State's ability to hire able persons to perform its essential functions. * * * The only advantage conceivably to be lost by denying the States such an immunity [from those taxes] is that essential state functions might be obtained at a lesser cost because employees exempt from taxation might be willing to work for smaller salaries. * * * But that was regarded as an inadequate ground for sustaining the immunity and preventing the National Government from requiring these citizens to support its activities. * * * *The purpose of the implied constitutional restriction on the national taxing power is not to give an advantage to the States by enabling them to engage employees at a lower charge than those paid by private entities* * * * *but rather is solely to protect the States from undue interference with their traditional governmental functions.* While a tax on the salary paid key state officers may increase the cost of government, it will no more preclude the States from performing traditional functions than it will prevent private entities from performing their missions.
>
> * * * * *
>
> It is, of course, the case that a revenue provision that forces a State to pay its own way when performing an essential function will increase the cost of the state activity. But * * * [our decisions] teach that *an economic burden on traditional state functions without more is not a sufficient basis for sustaining a claim of immunity.*

435 U.S. at 458-459, 461 (plurality opinion) (emphasis added). Accordingly, in this area as well, it has been recognized that a private party is not entitled, by virtue of its relation with a state, to be

relieved of its lawful obligations pursuant to an Act of Congress even though such compliance would entail increased costs for the state in conducting its governmental functions.[25]

---

[25] The same rule is applicable to the immunity of the federal government from state taxation. For instance, as the Court observed in *United States* v. *County of Fresno*, 429 U.S. 452, 464 (1977) (footnote omitted; emphasis in original):

> The "legal incidence" of the [state] tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service—causing it to reimburse its employees for the taxes legally owed by them or, failing reimbursement, removing an advantage otherwise enjoyed by the Federal Government in the employment market. There is no other respect in which the tax involved in this case threatens to obstruct or burden a federal function. The tax can be invalidated, then, only if it discriminates against the Forest Service or other federal employees, which it does not do.

See also *United States* v. *Boyd*, 378 U.S. 39, 44 (1964) ("[t]he Constitution immunizes the United States and its property from taxation by the States, * * * but it does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States"); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954); *Curry* v. *United States*, 314 U.S. 14, 18 (1941); *Alabama* v. *King & Boozer*, 314 U.S. 1, 8-9 (1941) (emphasis added):

> [T]he Constitution * * * [does not] prohibit[] a tax exacted from the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a non-discriminatory state tax

Finally, this Court has previously distinguished between the government and a government contractor for purposes of the Fair Labor Standards Act. In *Powell* v. *United States Cartridge Co.*, 339 U.S. 497 (1950), the Court held that the Act applies to employees of a government contractor operating a government-owned munitions plant under a cost-plus-a-fixed-fee contract with the government, since they were employees of the plant contractor rather than of the United States and therefore were not within the statutory exemption for the federal government.[26] Cf. *United States* v. *Boyd*, 378 U.S. 39, 47-48 (1964); *United States* v. *Pennsylvania Environmental Hearing Board*, 584 F.2d 1273 (3d Cir. 1978). The court of appeals' decision in the present case disregards

---

upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other *does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity.*

[26] Similarly, from the time of its enactment more than 40 years ago, the Fair Labor Standards Act has been applied to private employers under contract with a state, and the courts have consistently rejected the claim that such employers were within the prior statutory exemption for "any State or political subdivision of a State" (29 U.S.C. (1964 ed.) 203(d)). See, *e.g.*, *Public Building Authority of Birmingham* v. *Goldberg*, 298 F.2d 367, 369 (5th Cir. 1962); *Walling* v. *McCrady Const. Co.*, 60 F. Supp. 243, 245 (W.D. Pa. 1945), aff'd, 156 F.2d 932, 934 (3d Cir.), cert. denied, 329 U.S. 785 (1946); *Mitchell* v. *Singstad*, 177 F. Supp. 376, 382 (D. Md. 1959); *Walling* v. *New Orleans Private Patrol Service*, 57 F. Supp. 143, 148 (E.D. La. 1944); *Walling* v. *Craig*, 53 F. Supp. 479, 483-484 (D. Minn. 1943).

this distinction and is incompatible with the underlying analysis in *Powell*.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

MARK I. LEVY
Assistant to the Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

KERRY L. ADAMS
Attorney
Department of Labor

AUGUST 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 78-2532

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS, a Montana Corporation, PLAINTIFF-APPELLEE

v.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor; and ZAVIER M. VELA, Administrator of the Wage and Hour Division, United States Department of Labor, DEFENDANTS-APPELLANTS

Argued and Submitted Aug. 14, 1980

Decided April 20, 1981

Before WRIGHT and ALARCON, Circuit Judges, and FRYE *, District Judge.

FRYE, District Judge:

The Secretary of Labor and the Administrator of the Wage and Hour Division of the Department of Labor appeal from the district court's order which exempts the employees of the Sidney Group Home, operated by the Richland County Association for Retarded Citizens, from the minimum wage/maximum

---

* Honorable Helen J. Frye, United States District Judge for the District of Oregon, sitting by designation.

hour provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206-207. We affirm.

FACTS

In 1973 the Montana Legislature passed an Act designed to "deinstitutionalize" developmentally disabled adults by providing training and treatment for them in family-oriented residences in local communities rather than in large state-operated institutions. Mont. Rev. Codes Ann. § 71-2001. Funding for and management of these residences was to be provided through local nonprofit corporations rather than by the Montana Department of Social and Rehabilitation Services (DSRS) in order to avoid establishing mini-institutions throughout the State.

The Richland Association for Retarded Adults (Association) is a private nonprofit corporation which operates the Sidney Group Home (Home), a residential home for mentally retarded adults in Richland County, Montana. The Association was formed with the encouragement and assistance of DSRS. After its formation, the Association contracted with the Developmental Disabilities Division (Division) of DSRS to provide local residential care and training for eight mentally retarded adults.

The contract between the Division and the Association allows the Association to maintain local control over the methods, times, means, and personnel for furnishing services to the Home residents. The Association elects a Board of Directors to oversee the daily operations of the Home. The Board of Directors is also responsible for hiring and paying the group home parents.

The Association operates almost entirely with state and federal funds. It receives both state and federal

grants, and it receives the greater share of the Supplemental Security Income payments received on behalf of the residents. It also receives some private donations. The cost of group home care is about one-half that of state institutional care.

The Division provided the Association with the down payment for the residence, and the Division insures the performance of the contract. Residents are referred to the Home from state agencies, families, or physicians.

The contract between the Association and the Division incorporates a budget attachment which provides for hiring group home parents who are classified as "professional" and, therefore, paid a monthly salarly rather than an hourly wage. The duties and hours of the group home parents are essentially the duties and hours of any parent—as needed 24 hours a day. The purpose of the State of Montana in having group home parents is to avoid the number of persons involved in three eight-hour shifts in order to maintain a consistent family-like environment for the mentally retarded adults in the Home.

The Department of Labor conducted an investigation and concluded that the Fair Labor Standards Act (FLSA) applies to the Home and that the Association must pay overtime to the group home parents. The Association filed suit to obtain a declaration that FLSA does not apply to the Home.

The trial judge, relying on *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), found that the Home was the alter ego of the State of Montana and that to apply the FLSA to the Home would be to displace the State's choice of method in carrying out its traditional function of caring for its developmentally disabled citizens. He found the FLSA unconstitutional as applied to the Association.

ISSUE

Are employees of a private nonprofit organization, who perform integral governmental functions traditionally performed by a state, exempt from the minimum wage/maximum hour provisions of the Fair Labor Standards Act?

STANDARD OF REVIEW

The facts are undisputed. The determination by the trial court is therefore a legal one and entitled to no deference. *United States* v. *One Twin Engine Beech Airplane, etc.*, 533 F.2d 1106, 1108 (9th Cir. 1976).

HISTORY OF THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act, as enacted in 1938, required private employers to pay minimum wages and overtime. It specifically excluded the United States and any state or subdivision of any state.[1] In 1966 the Act was amended so that it included employees of state hospitals, institutions, and schools.[2] In 1974 the Act was extended to cover all state employees and employees of state political subdivisions except for executive, administrative, or professional personnel and elected officials.[3]

The 1974 Amendments were challenged by the National League of Cities, the National Governors' Conference, 19 individual States, and five municipalities. *National League of Cities* v. *Usery, supra.* They contended that to apply the FLSA virtually across the board to state and municipal governments in-

---

[1] 29 U.S.C. § 203(d) (1940 ed.).

[2] 80 Stat. 831, 29 U.S.C. § 203(d) (1964 ed., Supp. II).

[3] Pub. L. No. 93-259, § 6(a)(1), (5), (6), 88 Stat. 58 (1974) (codified at 29 U.S.C. § 203(d), (s)(5), (x) (1970).

fringes upon the established constitutional doctrine of intergovernmental immunity and permits the Congress through the Commerce Clause to trammel upon state sovereignty.

In *National League of Cities* the court held that insofar as the 1974 Amendments operate directly to displace the states' ability to structure employer-employee relationships in areas of integral government functions, such as fire prevention, police protection, sanitation, public health, and parks and recreation, they are not within the authority granted Congress by the Commerce Clause.

In reaching its conclusion, the Court distinguished federal regulation of private persons and businesses from similar regulation directed to the States as States. The Court concluded that wage and hour determinations made with respect to functions which state and local governments are created to provide and which state and local governments have traditionally afforded their citizens are matters essential to separate and independent existence of the states, and hence beyond the reach of Congressional power under the Commerce Clause. The Court also expressly overruled *Maryland* v. *Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), which had upheld the extension of the FLSA to employees of state hospitals, institutions, and schools.

In reaching its decision in *National League of Cities*, the Court cited *Fry* v. *United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975) as follows:

> While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *U.S.* v. *Darby*, 312 U.S. 100, 124, 61 S.Ct. 451, 462, 85 L.Ed. 609 . . . (1941), it is not without

> significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. 426 U.S. at 842-43, 96 S.Ct. 2470.

The statement in *Fry* is broad, but the ruling in *National League of Cities* is much narrower. It applies only to States as States, and it applies only when the exercise of the Commerce power *directly* affects the state's integrity or ability to function effectively in a federal system. In fact, the Court specifically says:

> . . . we have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress' power to regulate commerce. *Id.*, 426 U.S. at 854, 96 S.Ct. at 2475.

APPLYING THE RULES OF NATIONAL LEAGUE OF CITIES

The key issue is whether the operation of the Home is an "integral government function" within the scope of *National League of Cities.*

Defendants-appellants contend the Association is a private employer. They cite its private, nonprofit status, its contractual relationship with the state, and the absence of attributes of sovereignty.

Plaintiff-appellee responds that (1) the Home employees perform a traditional government function although they are not employed directly by the state; and (2) application of FLSA would interfere with the state's policy of deinstitutionalized care for its mentally disabled citizens.

Elements which serve "to clarify and define a method by which a protected government function may be identified" are

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain; (3) government is the principal provider of the service or activity; and (4) government is particularly suited to provide the service or perform the activity because of a community-wide need for the service or activity.

Amersbach v. *City of Cleveland*, 598 F.2d 1033, 1037 (6th Cir. 1979). *See Williams* v. *Eastside Mental Health Center, Inc.*, —— F.Supp. ——, No. 79-G-0524-S, slip op. at 3-4 (N.D. Ala., April 10, 1980).

Applying these factors, we agree with plaintiff-appellee that the operation of the Home is an integral government function exempt from compliance with FLSA. The Home benefits the public by providing local, residential care and training for the mentally retarded at one-half the cost of state institutional care. As a nonprofit corporation, the Association is interested in the care of its patients and not pecuniary gain.

The government is the originator and principal provider of the care. The decision to deinstitutionalize care for these citizens by placing them in local "homes" originated with the state. The DSRS assisted the Association in its formation. The Association is funded almost entirely with state and federal funds and must comply with state standards. DSRS provided the down payment for the Home and oversees the performance of the contract.

There is a communitywide need for the care of these people and the government is best suited to provide it, either directly through state institutions or indirectly by assisting local "homes."

Our decision finds further support in *Williams*. Presented with very similar facts, the District Court concluded the operation of a nonprofit community mental health center is an integral government function exempt from compliance with FLSA. At ——.

Finally, we note that our decision does not mean, as the dissent suggests, that states will have the sovereign right to haphazardly contract all services to the private sector at a rate cheaper than that for equivalent services provided by the private sector exclusively. A service must qualify as an "integral government function" before it would be exempt from the FLSA. This will insure the presence of traditional and substantial state involvement.

We also find that, contrary to the dissent's belief, *National League of Cities* does not require direct state involvement. The key is state involvement and the performance of an integral government function.

CONCLUSION

The care of its disabled citizens is a duty traditionally assumed by a state. Because the Association essentially stands in the position of the State in providing a traditional government service, and because the minimum wage/maximum hour requirements of the FLSA as applied to The Association constitute a direct federal interference with Montana's exercise of its sovereignty, we conclude that the group home is exempt under the rule of *National League of Cities* from application of the FLSA.

AFFIRMED.

ALARCON, Circuit Judge, dissenting:

I dissent. The court has concluded that the tenth amendment prevents Congress from enacting laws under the Commerce Clause which regulate the private sector in the performance of activities formerly performed by the state of Montana. We are told that this conclusion is compelled by *National League of Cities* v. *Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

My review of *National League of Cities* v. *Usery* leads me to the opposite conclusion. In *National League of Cities* v. *Usery*, the plaintiffs brought an action which "asserted in effect that when Congress sought to apply the Fair Labor Standards Act provisions virtually across the board to employees of state and municipal governments, it impinged a constitutional prohibition in favor of the States as *States*." *National League of Cities* v. *Usery*, at 837, 96 S.Ct. at 2467. The Court agreed, stating that ". . . the dispositive factor is that Congress has attempted to exercise its Commerce Clause authority to prescribe minimum wages and maximum hours to be paid by the States in *their capacities as sovereign governments*." (emphasis added) *National League of Cities* v. *Usery*, at 852, 96 S.Ct. at 2474. In reaching this conclusion the Court carefully distinguished between federal regulation of private persons and business enterprises "necessarily subject to such sovereignty of the government of the Nation and of the *State* . . ." and regulations "directed not to private citizens, but to the States as States." Id. at 845, 96 S.Ct. at 2471. Indeed, the plaintiffs in *Usery* specifically acknowledged the broad power of Congress to regulate private businesses through the Commerce Clause. *Id.* at 840-41, 96 S.Ct. at 2468-69.

The Associaiton involved in this case is not a state or municipality, is not an *agency* of a state or municipality, but is a private, non-profit corporation. The private corporation, not the state of Montana, elects the Association's Board of Directors. The private corporation, not the state of Montana, retains control over the "methods, times, means, and personnel" for furnishing the contracted for services. The private corporation, not the state, hires and pays the employees. The corporation, in every sense of the word, is a private business. The minimum wage and hour provisions of the Fair Labor Standards Act applicable to the private sector have long been recognized as a valid exercise of Congress' Commerce Clause power, a result reaffirmed in *Usery*.

The majority of this court has ignored the court's clear articulation of the "dispositive factor" in *Usery*, holding instead that a private non-profit corporation somehow takes on the trappings of a sovereign government when it is engaged in activities which were formerly offered by the state. No authority is cited to explain this curious metamorphosis, or to support this astonishing proposition.

The majority asserts instead that the "key issue" to be resolved here is whether the private non-profit corporation is performing an "integral government function." Slip Opinion at 1538, at ——. Even if it is conceded that the Richland County Association for Retarded Citizens is engaged in an "integral government function", the evidence shows conclusively that it is a private entity and not a unit of state government.[1] Under *Usery*, it is *unnecessary* to determine

---

[1] As analyzed above, it is my view that the tenth amendment has no application to the Richland County Association for Retarded Citizens because it is a private entity and not a

whether the service performed is a traditional governmental function if the employer is in a private sector. The tenth amendment applies solely to the states *as States.*

The majority suggests that the case of *Williams* v. *Eastside Mental Health Center, Inc.*, —— F.Supp. ——, No. 79-G-0524-S (N.D.Ala., April 10, 1980) supports their position. In my view, *Williams* differs in a crucial respect from the case before us. In *Williams*, the provider was found to be a *public, not* a private corporation. The district court in *Williams* detailed at considerable length the extent to which the corporation there was controlled by public agencies; for example, public agencies appointed the corporation's Board of Directors and had full and absolute power of ratification over the corporations' budget, Articles of Incorporation, and By-Laws. By contrast, the corporation involved here is very clearly a private corporation.

The majority has also cited us to the case of *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979) for a definition of a protected government function. In *Amersbach* v. *City of Cleveland* the court determined that the maintenance of a municipal airport by the City of Cleveland was an integral function of government. The City of Cleveland argued, unsuccessfully, that the operation of an airport by a municipality was a proprietary

---

unit of state government. Accordingly, we need not reach the question of whether care for the developmentally disabled is a traditional governmental function. It is quite clear, however, that Montana, through the exercise of its sovereign powers, has determined that such services shall be left to the private sector and will no longer be a *governmental* function in that state.

rather than a governmental function. In *Amersbach*, the first prong of *Usery* was not in issue; the employer involved in that case was the City of Cleveland, not a private business. *Amersbach* involved only the second portion of the inquiry set out in *Usery*—i.e., whether the activity under discussion was an "integral government function." If anything, *Amersbach* v. *City of Cleveland* confirms that the exemption from the minimum wage/maximum hour law created by *National League of Cities* v. *Usery* applies only when a unit of government is the employer.

The majority alternatively suggests that subjecting employees of the Association to the minimum wage and hour laws is a "direct federal interference" with Montana's exercise of its sovereignty. Slip Opinion at 1539, at ——-——. In support of this claim, the majority argues that forcing compliance with the minimum wage and hour laws will (a) completely thwart Montana's decision to provide assistance to the mentally disabled in a normal home environment, and (b) more generally, directly displace Montana's freedom to structure its own integral operations—i.e., care of the mentally disabled—by making it prohibitively expensive to contract such work out to the private sector.

The majority's first argument is based on a false premise. The minimum wage and hour laws do not thwart Montana's decision to provide decentralized care for the mentally disabled. Montana might choose to establish a *public* corporation to administer its program, as did the state of Alabama in *Williams* v. *Eastside Mental Health Center, supra.* Group home parents would presumably be employees of the State of Montana, and therefore exempt from the Fair

Labor Standards Act under *Usery*. Alternatively, the state might choose to administer the program itself, again making the group home parents its employees. Utilization of a private non-profit corporation is not the only way to administer a group home program.

The majority's second argument is far more troubling. Stripped to its essentials, the argument is that the federal minimum wage and hour laws interfere with state sovereignty because they increase the cost of contracting state business out to private business, making such contracting a less attractive and sometimes prohibitively expensive option.

There are at least two problems with this argument. I agree that this position may have a certain superficial attraction in this case, where the state's decision to use a private corporation to implement a most laudable program may have made that program prohibitively expensive. Nevertheless, that attraction must be resisted. Virtually every other "integral" state function—police, fire, education, health services, refuse collection—could conceivably be contracted out to private businesses. The majority's decision is an open invitation to states and municipalities to solve their fiscal problems by contracting out their services to private companies which would then be freed from any legal obligation to pay decent wages or set reasonable working hours. Such a result cannot be required by the tenth amendment.

More fundamentally, the majority's basic assumption is unsound. The majority assumes that whenever a federal wage law adversely affects a state's decision to structure essential services in a certain way, the federal government is unconstitutionally intruding into that state's sovereignty. This assumption is incorrect. First, even assuming that the state's funda-

mental right to structure its own essential services is involved in this case, no law at issue in this case *prohibits* the state from contracting with private companies for the provision of essential state services if the state so chooses. Secondly, I agree that the minimum wage and hour laws undoubtedly make such contracts more expensive than they otherwise would be. But the states have no inherent tenth amendment right to *demand* that contracts with private businesses (must) always be cheaper or more desirable than providing the services themselves. The states must come to the private sector as it is, evaluating whether the private sector, subject as it is to minimum wage laws, worker's compensation requirements, and child labor laws, can still provide equivalent services at a lower cost. To hold otherwise would mean that the states have a sovereign right to contract their services out to the private sector at a cheaper cost, and that anything which federal wage laws which increase those costs necessarily interfere with that right. One looks in vain in *Usery* for principles justifying such a result.

I would reverse the order of the district court and hold that the Richland County Association for Retarded Citizens as a private non-profit corporation, has failed to establish that it is exempt from the provisions of the minimum wage/maximum hour provisions of the Fair Labor Standards Act.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HAVRE-GLASGOW DIVISION

CV-77-56-BLG

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS, a Montana corporation, PLAINTIFF

—vs—

RAY MARSHALL, Secretary of Labor, United States Department of Labor; and WARREN D. LANDIS, Administrator of Wage and Hour Division, United States Department of Labor, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on the 23rd day of January, 1978, before the Court sitting without jury. Mr. W. William Leaphart represented the plaintiffs and Mr. Henry C. Mahlman represented the defendants. Having heard the evidence and considered the stipulations and exhibits of the parties, the Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. The defendant, Ray Marshall, is Secretary of Labor for the United States Department of Labor

and is responsible for enforcing the Fair Labor Standards Act, 29 U.S.C. § 201 through § 219 ("the Act").

2. Defendant Warren D. Landis is the Acting Administrator of the Wage and Hour Division of the United States Department of Labor.

3. Virginia Bucher Harmelink and Bryce Harmelink were, at all times relevant to this action, "group parents" in the Sidney Group Home, Sidney, Montana.

4. Plaintiff Richland County Association for Retarded Citizens is a non-profit corporation incorporated under the laws of the State of Montana, which has an existing contract with the Montana Department of Social and Rehabilitation Services for the providing of "group home living and training programs" in the Sidney Group Home, Sidney, Montana.

5. In 1975, the Forty-fourth Legislative Assembly of the State of Montana began a program of "deinstitutionalization" of the care and treatment of developmentally disabled persons.

6. The deinstitutionalization was to be accomplished by placing as many developmentally disabled persons as possible in community homes to be run by local non-profit corporations.

7. As of June, 1977, pursuant to the deinstitutionalization program, 245 developmentally disabled persons have been placed in community-based homes run by non-profit corporations. This figure represents 66% of the Boulder River School and Hospital population.

8. The care of developmentally disabled persons in state institutions at Boulder and Galen is provided by "habilitation aides" who work in three shifts

of eight hours each. The habilitation aides do not eat with or sleep in the same quarters with the developmentally disabled. The developmentally disabled persons in the state institutions do not participate in the purchase of supplies and food nor do they participate in the cooking of the food.

9. Pursuant to the "deinstitutionalization" program, a community-based home was established in Sidney, Montana.

10. The Richland County Association Group Home (the Sidney Group Home) is a home for nonrestrictive residential care of developmentally disabled adults. The home is owned and operated by the Richland County Association for Retarded Citizens.

11. The Sidney Group Home houses a maximum of eight developmentally disabled adult clients at any one time. The home is situated on the outskirts of the city limits of the City of Sidney, Montana, and is indistinguishable from other private homes in that area. The group home is operated as a normal residential family home.

12. Food supplies and maintenance materials are regularly purchased from local merchants in Sidney, Montana. Many of the food items, supplies and maintenance materials are produced outside the State of Montana.

13. The food, supplies and maintenance materials are purchased primarily for the developmentally disabled persons (hereinafter called "clients").

14. The clients participate in the purchasing of food and supplies with the assistance of the parents.

15. The clients participate with the parents in the cooking of the meals and the day-to-day maintenance of the home. All meals are family style with the parents and the clients eating together.

16. The group home parents are solely responsible for the care and supervision of the eight clients during all hours that the clients are not at the sheltered workshop or at the homes of their respective parents. The clients who were accepted into the homes had IQ's below 60 and were unable to function on their own, *i.e.*, the IQ of each client was such that the client will need aid or assistance all of his or her life. The clients require more or less constant supervision.

17. During week days, the clients are at the sheltered workshop from approximately 9:30 a.m. to 3:30 p.m. During this period of time, the parents prepare their evaluations of individual client progress and do the bookkeeping for the home. The home is required to make monthly reports to the Department of Social and Rehabilitation Services Developmentally Disabled Division on the progress of each client.

18. The Sidney Group Home was started during the period of January and February, 1976, when employees of the Developmentally Disabled Division of the Department of Social and Rehabilitation Services recruited local people to form an association for retarded citizens. With the encouragement and the assistance of the Developmentally Disabled Division, the Richland County Association for Retarded Citizens formed a non-profit corporation.

19. The Richland County non-profit corporation then entered into a contract with the Developmentally Disabled Division of the Department of Social and Rehabilitation Services for the provision of residential care and training of developmentally disabled persons.

20. The Developmentally Disabled Division of the Department of Social and Rehabilitation Services

granted the Richland County Association for Retarded Citizens $9,000 in state funds for the purpose of making a down payment on a residence and for the purpose of furnishing said residence.

21. The Developmentally Disabled Division has a policy of treating the duties and obligations of group home parents as professional in nature. Accordingly, the contracts between the Developmentally Disabled Division of the Department of Social and Rehabilitation Services and the various non-profit corporations provide that group home parents be paid on a salary basis rather than on an hourly wage basis.

22. Pursuant to its contract with the Department of Social and Rehabilitation Services, the Sidney Group Home hired Bryce and Virginia Harmelink to work as group home parents for a combined monthly salary of $650.00. This salary was later increased to $800.00, and then to $900.00 per month.

23. The clients were placed in the Sidney Group Home by means of referrals from replacement specialists from Boulder River School and Hospital, by the Home Board and Screening Committee and by families of developmentally disabled persons.

24. Once the operation of the home was started in February, 1976, there were frequent contacts between representatives of the Developmentally Disabled Division and the group home parents. The Developmentally Disabled Division regional staff would act as advisors to both the parents and the Home Board and would make sure that the contract was being performed.

25. During their tenure as group home parents at the Sidney Group Home, Bryce and Virginia Harmelink attended seminars conducted by the Developmentally Disabled Division of the Department

of Social and Rehabilitation Services on the training and residential care of developmentally disabled persons.

26. Developmentally disabled clients who reside in group homes receive full Supplemental Security Income (SSI) payments which amount to $167.80 Federal money per month. The State of Montana then supplements the SSI payment up to $104.00 per month per person.

27. The Developmentally Disabled Division recommends to the Home Board that $26.60 of the total $271.80 SSI money be allocated to each individual client for personal needs. The balance is then deposited in a group home account for operation and maintenance of the home as well as for the purchase of food and supplies.

28. The State of Montana Department of Social and Rehabilitation Services also provides $150.00 per month, per client, for training of the client. $15.00 of this amount goes directly to the client for personal needs.

29. In November of 1976, Virginia Harmelink, one of the group home parents at the Sidney Home, inquired of the Wage and Hour Division of the United States Department of Labor, in Billings, Montana, as to whether or not the Fair Labor Standards Act was applicable to the group home parents.

30. As a consequence of Mrs. Harmelink's inquiry, Ms. Patricia Murray of the Wage and Hour Division went to Sidney, Montana, and investigated the Sidney Group Home.

31. Ms. Murray concluded from her investigation of the group home that the home was in violation of the Fair Labor Standards Act and that the home owed $10,457.86 in back wages and overtime to group home parents and substitutes.

32. Subsequent to Ms. Murray's investigation, the Sidney Group Home Board considered hiring more parents and setting up a shift work schedule in order to comply with the Fair Labor Standards Act. This proposal was rejected by the Board as undesirable since it would break down the consistency of the training and undermine the "normal" home environment.

33. In lieu of a shift work program, the Sidney Group Home Board established a schedule whereby each parent was to limit the number of hours he or she worked to four hours per day (or one person working eight hours per day and the other person not working at all).

34. The group home parents attempted to comply with the eight-hour work schedule but found that the duties and obligations of their employment as parents could not be performed in an eight-hour day.

II. CONCLUSIONS OF LAW

1. This is an action for declaratory judgment under Title 28 U.S.C. § 2201, for the purpose of determining an actual controversy between the parties concerning the provisions of Title 29 U.S.C. §§ 201 through 219, known as the Fair Labor Standards Act. Such controversy involved the proper interpretation and the application of the Fair Labor Standards Act, a law of the United States, regulating commerce. The controversy is in all respects one of which this Court has jurisdiction under Title 28 U.S.C. §§ 1331 and 1337.

2. This Court has jurisdiction over the defendants' counterclaim pursuant to Section 17 of the Fair Labor Standards Act, Title 29 U.S.C. § 217.

3. Under Title 29 U.S.C. § 206(c), an employee is within the coverage of the Act if he or she is "employed in an enterprise engaged in commerce . . . ."

4. Under Title 29 U.S.C. § 203(r), "enterprise" is defined as "the related activities performed . . . by any person or persons for a common business purpose." That section also states that "activities performed by any person or persons—(1) in connection with the operation of . . . an institution primarily engaged in the care of . . . the mentally ill or defective who reside on the premises of such institution" are performed for a business purpose.

5. The Sidney Group Home is an "enterprise" within the meaning of Title 29 U.S.C. § 203(r). The Supreme Court has held on numerous occasions that the Act is remedial in nature and therefore subject to a construction as broad as its terms will allow. *Mitchell* v. *Lublin, McGaughey & Assoc.*, 358 U.S. 207, 211 (1959). Conversely, the exemptions from the Act's coverage are to be narrowly read. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490 (1945). To construe the term "institution" narrowly would do violence to the intent of Congress, expressed in the 1966 amendments to the Act, that the protection of the Act be extended to employees of nursing homes not previously covered. *See*, S. Rep. No. 1487, 89th Cong., 2d Sess., *reprinted in* [1966] *U.S. Code Cong. & Adm. News*, 3002, 3015. The fact that Congress intended to extend coverage to nursing homes, which may not technically qualify as "institutions" under the jargon of the industry, suggests that Congress did not select the term "institution" with its technical usage in mind. The term "institution" is broad enough to cover the Sidney Group Home, and the

related activities incident to the operation of the Home therefore constitute an "enterprise."

6. The Sidney Group Home is an "enterprise engaged in commerce" under Title 29 U.S.C. § 203(s), since its employees handle items such as foodstuffs and cleaning supplies which have travelled in interstate commerce. These items are "goods", as the term is defined in Title 29 U.S.C. § 203(i). The group home is not the ultimate consumer of the items, since they are purchased primarily for the ultimate use and benefit of the patients. *Brennan* v. *Indiana*, 517 F.2d 1179, 1182 (7th Cir. 1975); *Brennan* v. *Iowa*, 494 F.2d 100, 104 (8th Cir. 1974), *cert. denied* 421 U.S. 1015 (1975); *Brennan* v. *Dillion*, 483 F.2d 1334, 1336-37 (10th Cir. 1973).

7. Since the group home is an "enterprise engaged in commerce," its employees are within the statutory reach of the Fair Labor Standards Act.

8. "Deinstitutionalization" presents a considered policy choice by the State of Montana as to how it chooses to carry out the traditional governmental function of providing services to the mentally handicapped.

9. The Montana Legislature had two goals in mind in implementing the policy of deinstitutionalization: (1) to create a system of decentralized facilities under local management for the provision of services to the mentally handicapped; and (2) to provide facilities in which services could be furnished to the mentally handicapped in a family-oriented environment which approximates as closely as possible that of a normal home.

10. In order to shoulder the cost of minimum wage and overtime in group homes, the Montana De-

partment of Social and Rehabilitation Services would have to:

(a) Terminate some group home contracts in order to pay overtime to parents in the remaining homes; or

(b) Hire parents to work eight-hour shifts with no overtime; or,

(c) Terminate contracts with all of the group homes and have the Department run the homes itself.

11. Each of the three alternatives available to the State of Montana and to the various group homes displaces state policy regarding the manner in which Montana has chosen to structure the deliver of governmental services to developmentally disabled citizens.

12. If the Department of Social and Rehabilitation Services chose to terminate some of its contracts with non-profit corporations in order to free money for other group homes, there would be a decrease in the number of community facilities available and a concomitant increase in the need for institutional care in the State of Montana. This result directly displaces Montana policy of "deinstitutionalizing" care of the developmentally disabled.

13. If the Department of Social and Rehabilitation Services and Group Home Boards chose to hire parents on an eight-hour shift and wage basis, there would be a displacing of Montana's policy of creating a "family oriented residence" (R.C.M. 1947, § 71-2001) as well as a displacing of the Developmentally Disabled Division's policy of treating parents as professionals who work on a salary basis.

14. The Montana Department of Social and Rehabilitation Services could circumvent the provisions

of the Fair Labor Standards Act by terminating all contracts with non-profit homes and having the Department itself establish group homes. Under such a plan, the parents of the homes would be "state employees" and thus unquestionably exempt from the Fair Labor Standards Act under *National League of Cities* v. *Usury*, 426 U.S. 833 (1976). This approach would require at least a partial abandonment of Montana's policy of semi-autonomous, locally controlled facilities.

15. Application of the Fair Labor Standards Act to the plaintiff group home would require the home to hire parents on an hourly basis and to pay overtime for hours worked in excess of forty (40) hours per week, or, in the alternative, to enter into an agreement under § 7(j) of the Fair Labor Standards Act, Title 29 U.S.C. § 207(j), whereby overtime is paid for hours in excess of 80 hours during a 14-day work period.

16. The duties and responsibilities of a group home parent require that a parent be available twenty-four hours per day and that a parent be actively working from approximately 7 a.m. until 10 p.m. during each weekday and from 8 a.m. until 11 p.m. on weekends. The 50% cost increase (time and one-half for overtime) to the State of Montana to fund overtime payments to parents in 54 group homes throughout the state would be prohibitive.

17. While the plaintiff corporation is unquestionably an entity distinct from the State of Montana, it is not completely free from state control. The group home derives substantial financial and technical assistance from the State of Montana, in exchange for which it furnishes services which must meet exacting state standards. The Sidney Group Home is in all senses the alter ego of the State,

standing in the shoes of its creator, the State Department of Social and Rehabilitation Services, to provide a traditional state service to mentally handicapped adults.

18. The Fair Labor Standards Act is unconstitutional as applied to the plaintiff Association in its operation of the Sidney Group Home. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). Application of the requirements of the Act would inevitably result in displacement of one or more of the State of Montana's considered policy choices in carrying out its traditional function of caring for the mentally handicapped. *Id.* at 851. In addition, the financial burdens required by the minimum wage provisions of the Act would severely affect the State's fiscal decision-making in the area of services to the mentally handicapped. *Id.* at 846.

In consideration of the foregoing,

IT IS HEREBY ORDERED:

1. That the Sidney Group Home operated by the plaintiff Richland County Association for Retarded Citizens is declared to be exempt from the minimum wage/maximum hour provisions of the Fair Labor Standards Act, Title 29 U.S.C. §§ 206-207.

2. That defendants' counterclaim for injunctive relief be, and the same hereby is, denied.

The Clerk will enter final judgment by separate document consistent with the above orders, and notify the parties of the entry thereof.

Done and dated this 10th day of April, 1978.

/s/ James F. Battin
JAMES F. BATTIN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HAVRE-GLASGOW DIVISION

Civil Action File No. 77-56-HG

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS

vs.

RAY MARSHALL, Secy of Labor

JUDGMENT

This action came on for (hearing) before the Court, Honorable James F. Battin, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged That the Sidney Group Home operated by plaintiff Richland County Association for Retarded Citizens is declared to be exempt from the minimum wage/maximum hour provisions of the Fair Labor Standards Act, Title 29 U.S.C. § 206-207. That the defendants' counterclaim for injunctive relief be, and the same hereby is, DENIED.

Dated at Billings, Montana, this 12th day of April, 1978.

JOE E. PEDERSON
Clerk of Court

By /s/ Ada R. Alekush
ADA R. ALEKUSH

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-2532

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS, a Montana CORPORATION, PLAINTIFF-APPELLEE

v.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor; and XAVIER N. VELA, ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, DEFENDANTS-APPELLANTS

NOTICE OF APPEAL

Notice is hereby given that defendants-appellants, United States Secretary of Labor and Wage and Hour Administrator, hereby appeal to the Supreme Court of the United States from the Decision and Judgment entered in this action on April 20, 1981. This appeal is taken pursuant to 28 U.S.C. § 1252.

Dated this 19th day of May, 1981.

T. TIMOTHY RYAN, JR.
Solicitor of Labor

DONALD S. SHIRE
Associate Solicitor

By /s/ Daniel W. Teehan
DANIEL W. TEEHAN
Regional Solicitor
UNITED STATES DEPARTMENT OF LABOR
Washington, D.C. 20210
(202) 523-7570

Attorneys for Defendants-Appellants

APPENDIX E

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8

> The Congress shall have Power * * *
>
> * * * * *
>
> To regulate Commerce * * * among the several States * * *;
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution and foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI

> * * * * *
>
> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.

Tenth Amendment

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, provides in pertinent part:

Section 3(d), 29 U.S.C. 203(d)

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Section 3(r), 29 U.S.C. 203(r)

"Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose * * *. For purposes of this subsection, the activities performed by any person or persons—

(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school of mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution or school is public or private or operated for profit or not for profit), or

* * * * *

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

Section 3(s), 29 U.S.C. (Supp. III) 203(s)

"Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(5) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit); or

(6) is an activity of a public agency.

Section 3(x), 29 U.S.C. 203(x)

"Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

Section 6(a), 29 U.S.C. (Supp. III) 206(a)

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce, or in the production of goods for commerce, wages at the following [minimum] rates * * *.

Section 7(a)(1), 29 U.S.C. 207(a)(1)

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1961 951241 552

Supplemental Brief

Office - Supreme Court, U.S.
FILED
NOV 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-255

In the Supreme Court of the United States

OCTOBER TERM, 1981

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20530

TABLE OF AUTHORITIES

Page

Cases:

Associated General Contractors of California v. *Secretary of Commerce*, 77 F.R.D. 31 3

Draper v. *Davis*, 102 U.S. 370 3

Hovey v. *McDonald*, 109 U.S. 150 3

Schempp v. *School District of Abington Township*, 184 F. Supp. 381, vacated on other grounds, 364 U.S. 298 3

United States v. *Darusmont*, 449 U.S. 292 1

Statutes:

28 U.S.C. 1252 1

28 U.S.C. 1291 1

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-255

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE APPELLANTS

This supplemental memorandum is submitted to inform the Court of certain developments in this case occurring subsequent to the filing of the Jurisdictional Statement on August 7, 1981. We noted in the Jurisdictional Statement (J.S. 14-17) that the court of appeals lacked jurisdiction to entertain the government's appeal from the judgment of the district court, because 28 U.S.C. 1291 provides that the courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court." The district court had held the Fair Labor Standards Act unconstitutional, as applied to appellee, and therefore an appeal should have been taken to this Court pursuant to 28 U.S.C. 1252. See, *e.g., United States* v. *Darusmont*, 449 U.S. 292, 293 (1981). However, neither of the parties recognized the jurisdictional defect or called it to the attention of the court of appeals, and that court did not consider the question of jurisdiction in its ruling of April 20, 1981.

Subsequent to the filing of the Jurisdictional Statement, on August 21, 1981, the court of appeals entered an order withdrawing its opinion of April 20, 1981, from publication and stating that a "corrected" opinion would be forthcoming (Mot. to Affirm 8). On October 6, 1981, appellee filed a Motion to Affirm in this Court, contending that the appeal presents no substantial federal question. Appellee made no mention of any defect in the court of appeals' jurisdiction to render its original judgment, but questioned the court of appeals' jurisdiction to modify that judgment after the government had filed a notice of appeal to this Court (Mot. to Affirm 2). This Court has not yet acted on the appeal.

On October 9, 1981, the court of appeals, acting sua sponte, entered an order recalling its prior mandate, vacating its opinion of April 20, 1981, and entering judgment in accordance with a new opinion. The new opinion of October 9, 1981, reverses the judgment of the district court and upholds the constitutionality of the Fair Labor Standards Act as applied to appellee. The court of appeals again neglected to address the question of its jurisdiction to hear the appeal. The court of appeals also did not consider whether the filing of the government's notice of appeal to this Court on May 19, 1981, or the docketing of the appeal on August 7, 1981, divested the court of the appellate jurisdiction it evidently assumed it had previously enjoyed. The clerk of the court of appeals advised the Clerk of this Court of these developments by letter dated October 9, 1981, attaching copies of the court of appeals' order and its substitute opinion of that date.

On October 20, 1981, appellee filed a petition for rehearing in the court of appeals, arguing both that the court of appeals lacked jurisdiction of the government's appeal from the judgment of the district court and that the court of appeals was, in any event, divested of all jurisdiction by the filing of the government's appeal to this Court. Appellee

suggested that the court of appeals vacate its opinion of October 9, 1981, as well as the accompanying order.[1]

In our view, the posture of this case in this Court remains unchanged. As appellee now concedes, the court of appeals' judgment of April 20, 1981—the judgment that the government has asked this Court to review—is defective because the court below lacked jurisdiction to entertain the appeal. Moreover, we agree with appellee that, if the appeal had been properly before the court of appeals, that court would have been divested of jurisdiction upon the filing of an appeal to this Court.[2] We accordingly suggest that the orders of the court of appeals entered subsequent to the filing of the Jurisdictional Statement may be regarded as nullities,[3] and that this Court should consider the appeal without regard to intervening developments in the court of appeals.

---

[1]Appellee advised the Clerk of this Court of the filing of its petition for rehearing by letter dated October 20, 1981. We have lodged a copy of appellee's petition for rehearing with the Clerk of this Court.

[2]Although it may be that the court of appeals has some inherent power to recognize, for internal purposes, that its second opinion and order were entered without jurisdiction, or even to recognize that it never had jurisdiction in this case, it is beyond dispute that the court of appeals lacks power to decide the merits of this case. Accordingly, by a copy of this Supplemental Memorandum, we are advising the court of appeals, which has requested a response to appellee's petition for rehearing, of our view that it should take no further action in this case.

[3]*Draper* v. *Davis*, 102 U.S. 370, 371 (1880); *Associated General Contractors of California* v. *Secretary of Commerce*, 77 F.R.D. 31, 35-36 (C.D. Cal. 1977); *Schempp* v. *School District of Abington Township*, 184 F. Supp. 381, 383 (E.D. Pa. 1959), vacated on other grounds, 364 U.S. 298 (1960); see *Hovey* v. *McDonald*, 109 U.S. 150, 157 (1883).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor

NOVEMBER 1981

DOJ-1981-11

Motion to Dismiss or Affirm

81-255

Office-Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS,
CLERK

No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND XAVIER M. VELA, ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANTS,

v.

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS, APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

W. WILLIAM LEAPHART
C.W. LEAPHART, JR.
THE LEAPHART LAW FIRM
1 North Last Chance Gulch, #6
Helena, Montana 59601
(406) 442-4930

Attorneys for Appellee

TABLE OF CONTENTS

	Page
Opinions	1
Motion to Affirm	2
Question Not Substantial	2
Conclusion	5
Affidavit of Mailing	7
Appendix A	1a

TABLE OF AUTHORITIES

Page

Cases:

Association of General Contractors of California v. Sec. of Commerce of U.S., 77 F.D.R. 31 (C.D. Calif. 1977) 2

National League of Cities v. Usery, 426 U.S. 833 (1976) 3,4,6

Schempp v. School District of Abington Township, Penn., 184 F. Supp. 381 (E.D. Penn. 1959) vacated on other grounds 364 U.S. 298 2

In The Supreme Court of the United States

OCTOBER TERM, 1980

RAYMOND J. DONOVAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND XAVIER M. VELA, ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANTS,

v.

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS, APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO AFFIRM

OPINIONS

The opinion of the Court of Appeals (App. A to Jurisd. St., 1a-14a), is reported at 641 F.2d 1361. The opinion of the District Court (App. B to Jurisd. St., 15a-26a), is unofficially reported at 24 Wage & Hour Cas. (BNA) 99. Since the filing of the Appellant's Jurisdictional Statement, the Ninth Circuit Court of

Appeals, on August 21, 1981, issued an Order (App. A hereto) in which the Circuit Court withdrew its Opinion published at 641 F.2d 1361 for "corrections." Since the Circuit Court Withdrawal Order was issued after the filing of the Notice of Appeal on the 19th day of May, 1981 (App. D to Jurisd. St.) the Circuit Court would have no further jurisdiction to make any substantive changes in its previously published Opinion or Judgment. *Schempp v. School District of Abington Township, Penn.*, 184 F. Supp. 381 (E. D. Penn. 1959), vacated on other grounds, 364 U.S. 298; *Assoc. General Contractors of California v. Sec. of Commerce of U.S.*., 77 F.D.R. 31 (C.D. Calif. 1977). Appellee thus files this Motion to Affirm even though the "corrected" Opinion has not yet been issued by the Ninth Circuit Court of Appeals.

MOTION TO AFFIRM

Pursuant to Rule 16.1(c), of the rules of the United States Supreme Court, Appellee files this Motion to Affirm the Judgment of the Ninth Circuit Court of Appeals, 641 F.2d 1361, as well as the Judgment of the District Court of the State of Montana (App. C to Jurisd. St.) on the grounds that it is manifest that the issues addressed by the District Court and the Circuit Court are so unsubstantial as not to need further argument.

QUESTION NOT SUBSTANTIAL

The Appellants have stated the "Question Presented" as follows:

> Whether, under the "Constitutional Doctrine of Intergovernmental Immunity" recognized in *National League of Cities v. Usery*, 426 U.S. 833, 837 (1976), the Fair Labor Standards Act may con-

stitutionally be applied to a private employer that is under contract with a state to perform a traditional and integral governmental function previously carried out by the state itself. (See Appellant's Jurisdictional Statement [I]).

The question as propounded by the Appellants is, however, much broader than the question actually presented to and answered by the Montana District Court and the Ninth Circuit Court of Appeals. Appellant's framing of the question ignores the fact that the issue raised below has to do with the constitutionality of the Fair Labor Standards Act "as applied" to the Richland County home for retarded citizens — a home created at the instigation of the State of Montana in furtherance of a considered state policy to deinstitutionalize the care of the mentally retarded.

Properly framed, the question should read:

> Whether, under the Constitutional Doctrine of intergovernmental immunity recognized in *National League of Cities v. Usery*, 426 U.S. 833, 837 (1976), the Fair Labor Standards Act may constitutionally be applied to a private employer that is under contract with the state to perform a traditional and integral governmental function previously carried out by the state itself, *when such application displaces considered state policy choices "regarding the manner in which a state has chosen to structure the delivery of governmental services to developmentally disabled citizens."* (See App. B to Jurisd. St., p. 24a, No. 11, and p. 26a, No. 18).

In overstating the breadth of the issue, Appellants have exaggerated the substantiality of the question. Appellants ask, "May the Fair Labor Standards Act be constitutionally applied to a private employer that

is under contract with the state to perform a traditional and integral governmental function previously carried out by the State itself." This abstract question, of course, may be answered in the affirmative *unless* the application of the Fair Labor Standards Act displaces considered state policy choices regarding the structuring of traditional governmental functions.

The answer to the question hinges upon the determination of whether the application of the Fair Labor Standards Act displaces Montana's policy choices as to (1) deinstitutionalized care for the developmentally disabled, (2) through the establishment of group homes run by private nonprofit corporations, (3) which homes would be run on the basis of a "family environment", and (4) which homes are to be operated by salaried group home parents who are hired and treated as professionals.

The creation and operation of the Richland County home is so singular and unique to the State of Montana and its policy of deinstitutionalization as not to raise a federal question of sufficient substantiality to warrant further argument.

Appellants cite Judge Alarcon's dissent (App. A, Jurisd. St., pps. 13a-14a) wherein he characterizes the majority's opinion as an

> "...open invitation to states and municipalities to solve their fiscal problems by contracting out their services to private companies which would then be freed from any legal obligation to pay decent wages or set reasonable working hours. Such a result cannot be required by the tenth amendment." (Jurisd. St., p. 24).

Again, this is a gross overstatement of the holding of the District Court and the Circuit Court. A state, in contracting with a private corporation to perform

traditional governmental functions, does not affect an avoidance of the Fair Labor Standards Act. Under the *National League of Cities* decision, a State in utilizing its own state employees is exempt from the minimum wage and overtime provisions of the Fair Labor Standards Act. If Montana were to continue to provide care to the developmentally disabled through the state institution in Boulder, Montana, or through numerous state mini-institutions, the decision in *National League of Cities* would protect the State from having to pay minimum wage and overtime to the state employees in said institutions. Thus, the State does not need nor does it affect an avoidance of the Fair Labor Standards Act by contracting to have said services performed by private parties.

Secondly, in most situations, the private contracting corporation will, in fact, be subject to the wage and hour provisions of the Fair Labor Standards Act even though said private corporation may be performing a traditional governmental function. Application of the wage and hour provisions of the Fair Labor Standards Act does not *necessarily* displace a state policy regarding services. Only under exceptional circumstances would the wage and hour provisions of the Fair Labor Standards Act actually affect or alter the nature or substance of the service being delivered. In the case at hand, the lower Courts have held that the wage and hour provisions undermine the family environment as well as the essential elements of local control and professional status of the parents.

CONCLUSION

The facts and circumstances which gave rise to the lower Courts' findings that the Fair Labor Standards Act had displaced considered state policies are so unique to the situation extant at the Richland County

group home that they do not give rise to a federal question worthy of further argument. Thus, it is respectfully submitted that the Judgments of the Ninth Circuit Court of Appeals and/or the District Court for the State of Montana should be affirmed.

Respectfully submitted,

W. WILLIAM LEAPHART
C.W. LEAPHART, JR.

THE LEAPHART LAW FIRM
1 North Last Chance Gulch, #6
Helena, Montana 59601
(406) 442-4930

Attorneys for Appellee

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon REX E. LEE,

Solicitor General
Department of Justice
Washington, D.C. 20530

T. TIMOTHY RYAN, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

this _____ day of September, 1981.

C.W. LEAPHART, JR.
W. WILLIAM LEAPHART
THE LEAPHART LAW FIRM
1 N. Last Chance Gulch, #6
Helena, Montana 59601

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-2532

ORDER

RICHLAND COUNTY ASSOCIATION FOR RETARDED CITIZENS, a Montana Corporation, PLAINTIFF-APPELLEE,

v.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor; and ZAVIER M. VELA, Administrator of the Wage and Hour Division, United States Department of Labor, DEFENDANTS-APPELLANTS.

Before: WRIGHT and ALARCON, Circuit Judges and FRYE*, District Judge.

The opinion filed on April 20, 1981 is withdrawn from publication. A corrected opinion will be forthcoming.

BY ORDER OF THE COURT:

RICHARD H. DEANE
Clerk of Court

Christopher W. Vasil
By: CHRISTOPHER W. VASIL
Senior Deputy Clerk

---

* Honorable Helen J. Frye, United States District Judge for the District of Oregon, Sitting by Designation.